Filed 1/14/09 P. v. Ayala CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PEDRO AYALA, Defendant and Appellant.	A118439 (San Mateo County Super. Ct. No. SC062757

INTRODUCTION

Pedro Ayala, Jr. was convicted, following a jury trial, of attempted robbery. On appeal he contends (1) the prosecutor committed prejudicial misconduct during his cross-examination of appellant; (2) the prosecutor committed prejudicial misconduct during his closing argument; and (3) the failure by defense counsel to object to any of the alleged prosecutorial misconduct violated appellant's constitutional right to effective assistance of counsel. We agree that the prosecutor committed misconduct in this case. However, because we also conclude that appellant was not prejudiced by the misconduct, we shall affirm the judgment.

PROCEDURAL BACKGROUND

On January 3, 2007, appellant was charged by information with two counts of attempted robbery. (Pen. Code, §§ 664/212.5, subd. (c).)

On May 3, 2007, following a four-day trial, a jury convicted appellant of count one and acquitted him of count two.

On June 22, 2007, the trial court sentenced appellant to the lower term of 16 months in state prison.

On July 17, 2007, appellant filed a timely notice of appeal.

FACTUAL BACKGROUND

Prosecution's Case

Donna Flowerday, a bookkeeper at a Safeway grocery store in San Mateo, testified that on September 18, 2006, at around 9:00 p.m., she was inside the store's customer service booth counting money, something she did at approximately the same time every night. Flowerday was counting the contents of cash drawers, also known as "tills," that she had recently removed from the store's cash registers in order to tally the day's receipts. There was also a visibly open safe inside the booth. Flowerday estimated that she had approximately $6,000 with her in the booth that night. While the door to Flowerday's booth was locked, a window in the booth made her, the tills, and the open safe clearly visible to anyone in the store who approached the customer service booth from the outside.

Flowerday testified that she first noticed appellant when he approached the booth and asked her through the glass window for help getting cigarettes from a locked display case in the store. Flowerday decided to help appellant. As Flowerday opened the door she saw that appellant had pulled his scarf up from around his neck to cover his nose and face. She also noticed that appellant had blue masking tape wrapped around each of his fingers. Flowerday immediately screamed for help. Appellant then pushed open the door of the booth, grabbed Flowerday by the jaw and threw her to the floor, shutting the door behind him. When she fell, Flowerday injured the back of her head and bit her lip. Appellant told Flowerday to "shut the fuck up" and "open the till."

Marcos Ramos, a 17-year-old Safeway courtesy clerk on the night in question, testified that he came running to the customer service booth when he heard Flowerday's scream. When Ramos arrived at the booth he saw appellant through the window. Appellant opened the door and told Ramos to come inside. Ramos entered the booth and immediately punched appellant in the face because he "knew it was a robbery already

because he was in there." As Ramos and appellant fought, they spilled out of the booth and into the store. When appellant pushed Ramos to the ground and then tried to leave, Ramos shouted to his coworkers for help.

Noel Arganel, head clerk at Safeway, testified that he was helping a customer with groceries when he heard Flowerday screaming. Arganel looked towards the customer service booth, saw appellant and Ramos fighting, and then heard Ramos call out for help. Arganel ran to the booth, grabbed appellant, and began punching him. Arganel put appellant in a bear hug, forced him to the ground, and sat on top of him so he could not move. Appellant continued to struggle. When Arganel thought he saw appellant reach for a beer or wine bottle, Arganel began punching appellant again to subdue him.

While Arganel and appellant were struggling, another Safeway employee, Alan Bender, heard the commotion and came over to see what was happening. Bender helped Arganel and Ramos restrain appellant. Ramos then saw a crowbar lying on the ground and thought appellant was reaching for it, so he grabbed the crowbar and hit appellant in the head with it. Ramos, Arganel, and Bender held appellant on the ground until the police arrived and arrested him.

David Paolinelli, store manager of the Safeway at the time of the incident, testified that there were approximately 10 video surveillance cameras inside the store. There was one camera that monitored the customer service booth. Some of the surveillance cameras were hidden from view, but several were visible to the public, and the front door of the store had a sign explaining that the store was monitored by cameras. However, at the time of the incident, there was a mechanical problem with the cameras and none were working properly. As a result, although the cameras appeared from the outside to be working, there was no video or audio recording of the events in question.

Officer Ed Mateo of the San Mateo City Police Department testified that he arrived at the Safeway after another officer had handcuffed appellant. Officer Mateo testified that when he arrived appellant had an orange t-shirt around his neck and was wearing a gray sweatshirt. There were pieces of blue tape scattered on the floor in front of the customer service booth. Officer Mateo testified that his police report stating that

appellant hit Ramos in the head with a crowbar was incorrect, because Ramos was the one who struck appellant.

Defense Case

Appellant testified that, on September 18, 2006, he entered the San Mateo Safeway intending to buy cigarettes because he was nervous and needed to smoke. Appellant said he had no intention of robbing anyone inside the Safeway, a store where he regularly shopped and had worked three years earlier as a food clerk. Appellant was wearing an orange t-shirt around his neck as a scarf because it was cold outside. Appellant was wearing blue tape on his fingertips and had a concealed crowbar because he was en route to collect a debt from a person who had refused to pay. This person owed appellant $10,000 from drug deals they had done together several years earlier. Appellant needed the money now to pay the mortgages on his two homes and to support his girlfriend and their new baby. Appellant testified that he was not desperate for money because he owned a janitorial business and did construction work that provided him with steady income. However, appellant had recently seen the person who owed him money and decided it was time to collect the debt.

Appellant testified that, after entering the Safeway and finding the cigarettes in a locked display case, he saw Flowerday inside the customer service booth and asked her through the window for help getting cigarettes. According to appellant, he had the t-shirt around his neck but never pulled it up over his face and mouth. Flowerday came to the door to help appellant, but after opening the door she suddenly screamed. Appellant testified that Flowerday then pushed him, and in reaction he pushed her back and told her to "shut the fuck up" and "just chill." When Flowerday continued to scream, appellant became concerned with how the situation appeared and decided to leave.

As appellant tried to leave the customer service booth, Ramos appeared. Appellant told Ramos: "I just want to leave. I just want to get out of here." In response, Ramos said "No, that's not going down," and then punched appellant. Appellant and Ramos struggled. After being punched by appellant, Ramos fell to the ground. Appellant then again attempted to leave but Arganel appeared and began fighting with

him. During appellant's struggle with Arganel, the crowbar fell out of appellant's pants. Appellant never reached for the crowbar or any other object during the struggle. After Arganel pinned appellant to the ground, Ramos picked up the crowbar and struck appellant in the head. Appellant continued to struggle, but was unable to leave before the police arrived and arrested him.

According to appellant, he had met Flowerday, Arganel, and Bender before the date of the incident. Appellant knew Flowerday several years earlier when they both worked in the Safeway store. Appellant met Arganel when he helped appellant purchase groceries in the store and asked appellant about the baby footprints tattoo on his arm. Appellant met Bender at a party two years earlier thrown by Safeway employees for appellant's girlfriend, Lorena Fontino, who was leaving her job at the Safeway.

From appellant's experience working and shopping at the Safeway, he was aware that there were video surveillance cameras monitoring events in the store. Appellant believed that the cameras recorded both video and audio and assumed they were working on the night in question. Appellant testified that, when a police officer told him the day after his arrest that all of appellant's actions and statements at Safeway had been recorded, he responded he was happy about that because it would demonstrate he was not attempting to commit robbery. When appellant later found out that the cameras were broken and did not record anything, he was disappointed because he was "counting on that tape for everything."

Prosecution's Rebuttal

Lorena Fontino testified that she was appellant's girlfriend and lived with him in a five-bedroom house, along with their one-year-old child. She and appellant lived a "very comfortable" lifestyle and she did not believe appellant was overly concerned about money at the time of the incident. She testified that, while both she and appellant paid some of their bills, appellant was the primary manager of their finances. She did not know anything about appellant being owed a large sum of money by a friend at the time of the incident.

Sandra Tucker, a Safeway employee, testified that she called 911 after seeing that Flowerday appeared injured. When Tucker called 911, Flowerday was sitting on the floor nearby. When the 911 operator asked Tucker what had happened, Tucker asked Flowerday, who told her that appellant said "he wanted the money and to open the till."

DISCUSSION

Appellant contends his right to the effective assistance of counsel was violated by his attorney's failure to object when the prosecutor: (1) improperly asked appellant several times during cross-examination whether the prosecution's witnesses were lying; (2) improperly appealed during closing argument to the jurors' sympathy for the alleged victim; (3) improperly asserted during closing argument, based on evidence outside the record, that he did not coach the prosecution's witnesses; and (4) improperly expressed his opinion during closing argument that he did not believe appellant's testimony.

I. *Prosecutorial Misconduct*

Appellant contends the prosecutor committed misconduct during his trial. The California Supreme Court has explained that, " ' " '[a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The defendant need not show that the prosecutor acted in bad faith. (*Id*. at p. 822.)

Our high court has also observed that " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to *fair comment* on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . ' " ' [¶] Prosecutors, however, are held to an elevated standard of conduct . . . because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at pp. 819-820, italics added.)

A. Prosecutorial Misconduct During Cross-Examination

Appellant first contends that the prosecutor committed misconduct during his cross-examination of appellant when he asked a series of questions that forced appellant to characterize the witnesses against him as "liars." Appellant argues this was prosecutorial misconduct because, under the circumstances of this case, these "were they lying" questions had no legitimate purpose and were instead designed to improperly inflame the passions of the jury against appellant. We agree.

On five different occasions during the prosecutor's cross-examination of appellant, he described the testimony of a prosecution witness that conflicted with testimony appellant had provided during direct examination. The prosecutor then asked appellant to answer the following questions about the prosecution's witnesses: "Was [Donna Flowerday] not being truthful?" "You are saying that Marcos Ramos is not being truthful?" "[Noel Arganel is] not being truthful?" "So [Ramos] was not being truthful?" "So [Arganel, Ramos, and Bender] were lying?" To each question, appellant answered in the affirmative.

Our high court recently described the proper approach to a review of these kinds of questions from a prosecutor: "[C]ourts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*People v. Chatman* (2006) 38 Cal.4th 344, 384 (*Chatman*).) We also note that scrutiny of the propriety of "were they lying" questions by a prosecutor must be especially thorough when the defendant himself is the one who was put in the position of potentially inflaming the jury by labeling injured victims, police officers, or other sympathetic prosecution witnesses as unethical "liars."

The question here is thus whether the prosecutor's "were they lying" questions to appellant could conceivably have served any permissible purpose under the circumstances of this case. "[A] proper attack on a witness's credibility does not consist

solely of berating the witness; it requires presenting or eliciting additional evidence which bears on the witness's credibility." (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 240 (*Zambrano*).) Permissible purposes for "were they lying" questions would include giving a defendant who knows the witnesses personally an opportunity to explain why they might be biased against him or allowing a defendant who observed the events in question a chance to provide insight into why the other witnesses might understandably be mistaken rather than lying. (*Chatman, supra*, 38 Cal.4th at p. 383.)

In *Chatman*, the court found that a prosecutor did not commit misconduct when he asked a murder defendant a series of "were they lying" questions about key witnesses who were all friends and relatives of the defendant. (*Chatman, supra*, 38 Cal.4th at p. 383.) But crucial to that decision was the closeness of the defendant's relationship with the key witnesses, because it provided the defendant with a foundation upon which "[h]e could provide relevant, nonspeculative testimony as to the accuracy of their information and any motive for dishonesty." (*Ibid*.) As to the other witnesses against the *Chatman* defendant, the court found that the prosecutor's questions were generally designed to elicit from the defendant an explanation of any reason he knew of that would compel the witnesses against him to lie. "At least when, as here, the defendant knows the witnesses well, we think questions regarding any basis for bias on the part of a key witness are clearly proper." (*Ibid.)*

In contrast, where a prosecutor asked a defendant whether the two police officers who arrested him were lying about their version of events in a drug bust, the appellate court found that the prosecutor overreached. (*Zambrano*, *supra*, 124 Cal.App.4th at pp. 240-241.) The court concluded that "the prosecutor's 'were they lying' questions . . . did not clarify defendant's prior testimony, because he had already testified that his recollection of the alleged drug transaction differed from the officers' in every material respect. Nor did the questions inquire into any *facts or circumstances* surrounding defendant's testimony, or develop independent evidence which ran contradictory to his testimony. The questions served no purpose other than to elicit defendant's inadmissible

lay opinion concerning the officers' veracity. The questions merely forced defendant to opine, without foundation, that the officers were liars." (*Ibid*.)

Similarly, in the instant case when the prosecutor asked his "were they lying" questions, appellant had already presented to the jury a version of events at the San Mateo Safeway on September 18, 2006, that clearly contradicted the version testified to by the prosecution's witnesses. Appellant had already testified that he did not have his "scarf" pulled up to cover his face when he entered the customer service booth. Flowerday, Ramos, and Arganel had all testified that he did. Appellant had already testified that during his struggle with Arganel he never reached for the crowbar or any wine bottle on the floor. Ramos, Arganel, and Bender had all testified that he did. While appellant did testify that he was acquainted with most of the witnesses against him, there was no evidence that there was a sufficient relationship between appellant and any of them to provide a foundation for appellant to potentially explain why they might be biased against him. In other words, unlike the situation in *Chatman*, the prosecutor's "were they lying" questions to appellant in this case did not serve the permissible purpose of providing a real opportunity for appellant to explain *why* the witnesses against him might be lying. Nor did the prosecutor's "were they lying" questions provide appellant with any real opportunity to explain *how* the witnesses could have just been mistaken.

The prosecutor's "were they lying" questions here served no purpose other than to arouse the jury's passions against appellant by forcing him to characterize the series of sympathetic witnesses against him as "liars." As with *Zambrano*, "[t]his case illustrates how 'were they lying' questions can serve no evidentiary purpose and can be abused. Here, the prosecutor did not ask one or two 'were they lying' questions to clarify defendant's testimony. Defendant had already testified, quite clearly, that his recollection of the events . . . differed from the officers' in every material respect. Thus, before the prosecutor began her cross-examination, the jury must have understood that defendant was categorically denying the officers' version of events, and that the jury would have to decide who was telling the truth. Nevertheless, the prosecutor repeatedly and painstakingly asked defendant whether the officers were 'lying' about every aspect of

their testimony that differed from defendant's testimony. She used the questions to berate defendant before the jury and to force him to call the officers liars in an attempt to inflame the passions of the jury. This was misconduct." (*Zambrano, supra,* 124 Cal.App.4th at p. 242.) So, too, were the prosecutor's "were they lying" questions to appellant in the instant case prosecutorial misconduct.

B. Prosecutorial Misconduct During Closing Argument

Appellant also contends that the prosecutor committed three types of misconduct during his closing argument. Appellant argues that the prosecutor (1) improperly appealed to the passions of the jurors when he encouraged them to sympathize with the victim; (2) improperly relied on facts not in evidence to vouch for the credibility of his witnesses when he said he had not coached them on their testimony; and (3) improperly expressed his personal opinion about the veracity of appellant's testimony. We agree.

1. *The prosecutor's appeal to the jurors to sympathize with the victim*

At the beginning of his closing argument, the prosecutor told jurors: "We are here because as Donna Flowerday sits in that booth now after [the defendant's] actions, she doesn't know who's going to come to that door. She doesn't know when she's counting the money who's going to appear. She doesn't know who's going to knock. And if she tries to do the right thing, who's going to grab her by the face, throw her down, say, shut the fuck up and open the till."

Appellant asserts that, by encouraging the jurors to convict because the victim no longer feels safe, the prosecutor improperly offered an emotional reason to convict, preventing the jury from objectively determining appellant's guilt based on the evidence alone. It is settled law that, because criminal defendants must be convicted based only on the evidence in the record, it is generally misconduct for a prosecutor to appeal to jurors' sympathies by asking them to view the crime from the victim's perspective or to consider the impact of the crime on the victim. (*People v. Arias* (1996) 13 Cal.4th 92, 160; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318; *People v. Fields* (1983) 35 Cal.3d 329, 362.)

Respondent argues that the prosecutor's remark at the beginning of closing argument was merely an introductory statement designed to provide the jury with context for the evidence he would thereafter be summarizing for them. Respondent also maintains that it was necessary for him to focus the jury on Flowerday's feelings to provide the jurors with a plausible explanation for conflicts between her testimony and that of the other prosecution witnesses about the description of the "scarf" appellant was allegedly wearing around his face and neck when he entered the customer service booth. Respondent relies on *People v. Dennis* (1998) 17 Cal.4th 468, 518 (*Dennis*), where the court found that the prosecutor's reference in his opening statement to the impact of a mother's murder on the daughter who witnessed the killing was permissible comment because it was "reasonably necessary and unavoidable to prepare the jury for the difficulties and gaps in her testimony."

However, the "difficulties and gaps" rationale in *Dennis* does not apply to the prosecutor's remarks in the instant case for two reasons. (*Dennis, supra*, 17 Cal.4th at p. 518.) First, here the prosecutor's remarks did not speak to Flowerday's mental state at the time of the alleged crime, but described for the jurors how scared she currently feels every time she opens her door because of appellant's alleged actions. Information about Flowerday's present emotional state did nothing to help the jurors better understand Flowerday's perception of what happened when she opened the door to the customer service booth to help appellant.

Second, an essential reason the *Dennis* court did not find the appeal for sympathy for the victim to be misconduct was the magnitude of the crime and its impact on the victim, making it necessary for the prosecution to provide a rationale for the "difficulties and gaps" in the witness's testimony. (*Dennis, supra*, 17 Cal.4th at p. 518.) In *Dennis*, the witness was an eight-year-old girl who, when she was four, watched in horror on Halloween night as the defendant, wearing a wolf-mask, hacked the girl's eight-months-pregnant mother to death with a machete. (*Id.* at pp. 491-492.) On appeal, the defense asserted the prosecutor made improper remarks during her opening statement when she referred several times to the young daughter's experience with the attack, such as when

the prosecutor remarked: " 'She was to feel death's very presence in her own home where she felt normally very safe indeed.' " (*Id.* at p. 518.) However, the *Dennis* court concluded those kinds of remarks were not improper under the circumstances because they were necessary to explain why a traumatized child might not be able to recount the events surrounding her mother's murder completely clearly on the witness stand. (*Ibid*.)

In contrast, Flowerday was an adult victim of a failed robbery attempt. The prosecutor's remarks about her present emotional state were not necessary to explain the apparent "gaps and difficulties" in her testimony about past events. In fact, the record clearly shows that the prosecutor in his remarks made no effort to tie his comments about Flowerday's present and future fears to her testimony about her past perceptions. Only on appeal does respondent try to fit the prosecutor's commentary into the *Dennis* box. But unlike in *Dennis*, the prosecutor's remarks served no legitimate purpose and acted only as a play for the jury's sympathies for the victim. That was prosecutorial misconduct.

2. The prosecutor's assertion that his witnesses were not coached

During his closing argument, the prosecutor told the jury that the witnesses he had put on the stand were particularly credible, and the apparent contradictions in some of their testimony did not undermine their credibility because they simply demonstrated that he had not coached them on what they should say: "I talked to all the witnesses before we got here. But I didn't try to program them. I didn't try to tell them what to say. The fact that there were minor variances shows that you can trust them." Appellant asserts that this was prosecutorial misconduct because it effectively put before the jury facts outside of the evidence in the form of the prosecutor's unsworn testimony about the integrity of the witnesses he put forth and the strength of his overall case.

"Argument is improper when it is neither based on the evidence nor related to a matter of common knowledge." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 702.) A prosecutor's reference to facts not in evidence constitutes misconduct "because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although

worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.]" (*People v. Hill, supra*, 17 Cal.4th at pp. 827-828; accord, *People v. Huggins* (2006) 38 Cal.4th 175, 206; *People v. Frye* (1998) 18 Cal.4th 894, 971; *People v. Medina* (1995) 11 Cal.4th 694, 757.)

Respondent attempts to characterize the prosecutor's remark that he did not try to "program" his witnesses before trial as merely an observation by the prosecutor about evidence already in the record and not improper "vouching" based on information outside the record. Respondent argues that, considered in the context of the testimony that had come before it, the prosecutor's statement was nothing more than a recognition of the obvious, that Flowerday's testimony was inconsistent with other testimony in the record in regards to the color and character of the "scarf" appellant was wearing.

However, the prosecutor did not confine his comments only to an explanation of why Flowerday's testimony seemingly contradicted that of other witnesses on one point. The prosecutor expanded his remarks into a factual statement about something he said happened *before* trial. Yet there was nothing in the record that established what the prosecutor did or did not say to the witnesses before trial. By stating as fact the assertion that he had not attempted to tell his witnesses what to say, the prosecutor did precisely that which the law forbids. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or] her office behind a witness by offering the impression that [he or] she has taken steps to assure a witness's truthfulness at trial." (*People v. Frye, supra,* 18 Cal.4th at p. 971.) Consequently, when the prosecutor stated during his closing remarks that he "didn't try to program" his witnesses, he engaged in improper vouching and committed misconduct.

3. *The prosecutor's expression of his personal opinion about the veracity of appellant's testimony*

On three occasions during his closing argument, the prosecutor told the jury he personally did not believe appellant's testimony: "Now, I don't believe the defendant's story for a second. I don't think he was going to rob this other person. I really don't." "And again, remember, I don't believe his story for a second." "Again, I just want to go over a fact I don't believe that the defendant was on his way to collect this debt. I don't believe that." Appellant asserts that, by expressing his personal opinion about the believability of appellant's version of events, the prosecutor committed misconduct.

Respondent argues that these statements by the prosecutor were merely "fair comment" on the facts in evidence because the prosecutor's observations referred only to the testimony at trial and made no explicit references to any outside information he was privy to or experience he had with other cases. Moreover, respondent asserts that the context of each of the prosecutor's remarks was that they were all preceded or followed by an explanation of why the *jurors* should not believe appellant's testimony, and that he never implied the decision at hand was anything but theirs and theirs alone to make.

As long as they restrict themselves to inferences based on the evidence, prosecutors are generally allowed to make all kinds of "fair comment" to the jury about the facts of the case. "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . The right is very broad and includes the opportunity to fully state his views as to what the evidence shows and as to the conclusions to be drawn therefrom." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396; accord, *People v. Ward* (2005) 36 Cal.4th 186, 215.)

However, courts are reluctant to condone a prosecutor's argument when it invokes his or her personal beliefs or experiences. The problem is that such statements tend to, whether by accident or by design, go beyond "fair comment" on the evidence and instead encourage the jury to assume the prosecutor has some reason outside the boundaries of the evidence to know that a witness is lying or a defendant is guilty. This is an especially

dangerous risk when the prosecutor's statements of personal belief attack a defendant's testimony about his innocence. "In neither testimony nor argument should a prosecutor express a personal belief in a witness's credibility or in an accused's guilt. [Citation.] Especially if witness credibility is crucial, a prosecutor's expression of a personal belief in a witness's credibility or in an accused's guilt can jeopardize the fundamental fairness of the trial." (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 931.)

In the instant case, appellant's entire defense rested on the credibility of his testimony at trial. Appellant presented no other evidence besides his own testimony to explain his odd appearance and behavior on the night in question. In contrast, the prosecution put forth six witnesses, including the victim and a police officer, and two rebuttal witnesses, including appellant's own girlfriend, the mother of his child. The evidence against appellant was overwhelming. While the prosecutor of course had the responsibility to put forth the People's case in the strongest possible fashion, he neither needed to nor was allowed to go beyond the parameters of "fair comment" on the evidence when he invoked his personal disbelief in appellant's testimony multiple times in an attempt to undermine appellant's credibility in the eyes of the jury. In *People v. Bain* (1971) 5 Cal.3d 839, our high court held that a prosecutor may not "express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial. . . . [¶] In the instant case, the prosecutor did not merely state his opinion, based on inferences drawn from the evidence. He first remarked that he personally believed the defendant not to be innocent." (*Id*. at p. 848; accord, *People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.)

The prosecutor here was entitled to urge the jury to discount appellant's testimony based on its inherent implausibility or conflicts with the testimony of the other witnesses. However, he crossed the line into prosecutorial misconduct when he repeatedly invoked his personal beliefs as a reason the jury should find appellant guilty. That kind of personal statement from a prosecutor in a criminal case risks unfairly tilting the scales of

justice against the defendant by encouraging the jury to convict because it assumes the prosecutor knows best.

II. *Ineffective Assistance of Counsel*

Appellant argues that his attorney's failure to object to each of these instances of prosecutorial misconduct during his trial violated his constitutional right to effective assistance of counsel. The Fifth, Sixth, and Fourteenth Amendments, and article I, section 15 of the California Constitution, guarantee criminal defendants the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Huggins, supra*, 38 Cal.4th at pp. 205-206.) However, to succeed on an ineffective assistance of counsel challenge, the burden is on the defendant to show that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms." (*Strickland v. Washington,* at p. 688.) In addition, the defendant must affirmatively establish that prejudice resulted from his attorney's failures by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Id.* at p. 697.)

In the present case, we need not decide whether defense counsel's representation was in fact deficient because we conclude appellant was not prejudiced by his attorney's failure to object to the prosecutorial misconduct at his trial. Although the prosecutorial misconduct in this case occurred on several occasions during the trial, and none of it can be condoned, all of the misconduct was relatively benign in terms of its likely impact on the jury's verdict. Even considered cumulatively, the effect of all the misconduct here merely gave a slight additional emphasis to the obvious disparity between the strength of the prosecution's case and the weakness of the defense case. (See, e.g., *People v. Medina, supra,* 11 Cal.4th 694, 760-761 [prosecutor's improper vouching for witnesses and his appeal to passions of the jury were misconduct but were not prejudicial because none of the misconduct was serious enough, even in the aggregate, to prejudice

defendant]; *Zambrano, supra*, 124 Cal.App.4th 228, 243 [prosecutor's repeated "were they lying" questions were misconduct but were not prejudicial in light of defendant having already destroyed his own credibility with patently unreasonable testimony].)

Appellant argues that this case presented a close call for the jury and that the prosecutor's misconduct was therefore especially damaging because it all focused on undermining appellant's credibility and boosting that of the prosecution's witnesses, in effect handicapping appellant in the crucial credibility contest at the heart of his defense. But the overall evidence against appellant was simply overwhelming. Appellant entered the Safeway with duct tape around his fingertips and a crowbar in his pants. It is undisputed that appellant used force on Flowerday as he entered a room where there were thousands of dollars in cash. The testimony of Flowerday, while inconsistent with that of other witnesses in minor ways, was credible, and the testimony of five other prosecution witnesses corroborated Flowerday's version of events. Appellant's explanation for his unusual outfit, his weapon, and his behavior that night strains the bounds of believability to say the least. (See *Zambrano, supra,* 124 Cal.App.4th at p. 243.)

Moreover, any improper influence from the prosecutorial misconduct on the jury's decision would have been blunted by the fact that, both at the beginning of trial and before jury deliberations, the trial judge instructed the jurors: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence." (CALCRIM No. 222.)

In light of the likely minimal impact of the prosecutorial misconduct, the overwhelming evidence of appellant's guilt, and the prophylactic jury instructions, we conclude it is not reasonably probable the result would have been different if defense counsel had objected to any or all of the instances of prosecutorial misconduct at trial. Since there was no prejudice, we need go no further to determine that appellant's claim of ineffective assistance of counsel must fail. (See *Strickland v. Washington, supra*, 466 U.S. at p. 694.)

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

I concur:

_____
Richman, J.

A118439, *People v. Ayala*

People v. Ayala, No. A118439

Concurring opinion of Haerle, J.

I concur in the result of the opinion and in most of the analysis leading to that result. I do not, however, agree with the majority that the prosecutor committed misconduct during his closing argument regarding the impact of appellant's offense on Ms. Flowerday. Contrary to the majority, I believe that, under the standards set forth by our Supreme Court in *People v. Dennis* (1998) 17 Cal.4th 468, 518, those statements constituted permissible comment.

_____

Haerle, J.